ARGUMENT.

I.

A mere cursory inspection of the Governor's Warrant (Rec. 12, 13) and requisition and papers thereto annexed (Rec. 15-22) reveals that the purported affidavit which the Governor of the State of Mississippi certified as authentic in his demand or requisition (Rec. 16) was the purported affidavit made by W. Y. Brame before a deputy circuit court clerk and contained a mere recitation of events and not a statement of the essentials of the purported offenses therein mentioned (Rec. 21). The recitals contained in the Governor's warrant (Rec. 12, 13) prove conclusively that the Governor of Illinois relied upon this purported affidavit (Rec. 21) as charging the alleged "crime of wilful trespass, petty larceny and Escaping from jail" as the foundation for the extradition proceeding because the Governor of Illinois recited in his warrant that "the Governor of Mississippi has produced and laid before me a copy of an Affidavit, certified as authentic by said Governor and duly authenticated, and charging the said Jack Bell with having committed * * * the crime of Wilful Trespass, Petty Larceny and Escaping from jail."

This purported affidavit, although certified, *was made before a deputy circuit court clerk and not before a magistrate as required by Sec. 5278 of the Revised Statutes,* and could not furnish any lawful or constitutional authority for the issuance of the Governor's warrant which was plainly void and illegal and violative of the Federal Constitution and Act of Congress. *Roberts* v. *Reilly,* 116 U. S. 80, 95; *Compton* v. *Alabama,* 214 U. S. 1, 6, 7; *In re*

Strauss, 197 U. S. 324; *Ex parte Hart*, 63 Fed. 249, 259, 260; *United States ex rel. McCline* v. *Meyering*, 75 F. 2d 716, 718; *Ex parte Morgan*, 20 Fed. 298, 307; *State* v. *Chase*, 107 So. 541; *People ex rel. Merklen* v. *Enright*, 217 App. Div. 514, 217 N. Y. S. 288; *People ex rel. La Rue* v. *Meyering*, 357 Ill. 166; *People ex rel. Maypole* v. *Meyering*, 358 Ill. 589.

Certification of the affidavit made before a deputy circuit court clerk was not a sufficient compliance with the Act of Congress and petitioner should have been discharged. *Compton* v. *Alabama*, *supra*; *Roberts* v. *Reilly*, *supra*. The affidavit charging only the offense of escape (Rec. 19), relied upon by the respondent and by the Criminal Court of Cook County and the Supreme Court of Illinois as furnishing the basis for rendition of the petitioner, was not certified as authentic by the Governor of Mississippi and could not lawfully and constitutionally furnish the foundation for a rendition of petitioner. See cases cited above. The petitioner's right not to be unlawfully and unreasonably seized and arrested is well stated in *United States ex rel. McCline* v. *Meyering*, 75 F. 2d 716, 717 as follows:

> "The statute is one involving the substantial rights of citizens and its essential elements must be strictly followed. *Ex parte Morgan*, 20 F. 298, and *Ex parte Hart*, 63 F. 249. Only by faithfully following the provisions of the statute may a person be lawfully deprived of his liberty and extradited from an asylum state to another state, there to be tried for the commission of a crime. The alleged fugitive has a right not to be imprisoned or dealt with by the states in disregard of those safeguards provided by the constitution and statutes of the United States. *Compton* v. *Alabama*, 214 U. S. 1, 6."

The representations of the executive of the demanding state are of no avail or effect unless supported by a duly

authenticated copy of an indictment found or an affidavit made before a magistrate charging accused with crime. *Ex parte Hart, supra; Ex parte Morgan, supra; Ex parte Pfitzer,* 28 Ind. 450; *In re Knowlton,* 5 Crim. Law Mag. 250.

II.

The affidavit charging only escape from jail (Rec. 19) and relied upon by the respondent (Rec. 24, 26) and also by the Supreme Court of Illinois (Tr. Rec. 13) was not mentioned in the requisition or demand (Rec. 16) of the Governor of the State of Mississippi and was not certified as authentic by said Governor and as a consequence could not be the foundation for the issuance of the Governor's warrant for the rendition of petitioner. *Roberts* v. *Reilly,* 116 U. S. 80; *Compton* v. *Alabama,* 214 U. S. 1; *In re Strauss,* 197 U. S. 324. In any event the Governor's warrant issued for the arrest of petitioner was or would be void and illegal because it specified an offense different from the offense of escaping from jail which the respondent claims was specified in the affidavit presented to the Governor of Illinois by the demand for extradition of the petitioner. See 35 Corpus Juris Secundum p. 344, Sec. 16, Note 88; *People ex rel. Merklen* v. *Enright,* 217 App. Div. (N.Y.) 514, 518, 519, 217 N. Y. S. 288; *Ex parte Riddle,* 101 S. W. (2d) 268-9, 131 Tex. Cr. 563; *Ex parte Thomas,* 108 S. W. 663, 664, 53 Tex. Cr. 37; *Ex parte Cubreth,* 49 Cal. 435, 437; *Compton* v. *Alabama, supra; Roberts* v. *Reilly, supra.*

People ex rel. Merklen v. *Enright, supra,* is cited in 35 C.J.S. p. 344, Sec. 16, Note 88, as an authority for the proposition that a Governor's warrant, which specifies an offense different from the offense specified in the affidavit presented to the Governor by the demand for extradition, is void and illegal. In the latter case the New York Appellate Court

held the warrant invalid because an indictment or an affidavit charging the relator with the crime of the offense recited in the warrant was not before the Governor when the warrant was issued; it further held that as a condition precedent to the issuance of a warrant by the Governor of the asylum state there must be produced before him a copy of an indictment found or an affidavit made charging the person demanded with having committed a *specific crime* in the demanding state. The New York Appellate Division further held that a Governor's warrant, which recited that the crime charged was "false pretenses" which was a different offense than the special statutory offense charged in the indictment and created for the first time by statute in New Jersey in 1906, was void.

To the same effect was the holding of the court in the case of *Ex parte Riddle,* 101 S. W. (2d) 268, at 269, 270, where the law was stated as follows:

> "In the instant case the executive warrant fails to state that the accused is charged with any offense. Hence the arrest, detention and attempted removal from the state by virtue of said warrant was not legally authorized. Even though he may be charged with *an* (Italics ours) offense, yet if the warrant for his arrest fails to state *the* (italics ours) offense with which he is charged or fails to state any offense, his arrest and detention would not be lawful. It therefore follows that relator was entitled to be discharged."

A.

The Governor's warrant (Rec. 12, 13) charging petitioner with "the crime of wilful trespass, petty larceny and escaping from jail" supported only by an affidavit (Rec. 19) charging merely the offense of escaping from jail was void and illegal and violated petitioner's rights under the federal constitution and the Act of Congress. 35 C.J. S., p. 344, Sec. 16, Note 88; *People ex rel. Merklen*

v. *Enright, supra; Ex parte Riddle, supra; Ex parte Thomas, supra; Ex parte Cubreth, supra.* The warrant under which petitioner was arrested and detained was radically defective and did not accord to the petitioner the due process of law and the protection of personal liberty guaranteed by the Federal Constitution in all states of the Union. *Ex parte Reggel,* 114 U. S. 642 at 651; Art. IV, Sec. 2, Par. 2; and 4th, 6th, and 14th Amendments to the Federal Constitution; *Ex parte Burford,* 3 Cranch 448; *Gouled* v. *United States,* 255 U. S. 298, 304; *Grau* v. *United States,* 287 U. S. 124, 128.

The rule of law applicable to this situation is well stated in *Ex parte Cubreth,* 49 Cal. 435, 437:

> "The proceedings under the statute against fugitives from justice are required to be similar in all respects to those against persons charged with public offenses committed within the territorial limits of the State (Penal Code, Sec. 1550), and it is indispensable to their validity in either case that the warrant should specify the offense alleged to have been committed by the accused."

A proper construction of the words "charged with crime" as used in the constitution and Act of Congress and as they relate to an executive warrant precludes the insertion of *any crime* in the executive warrant and requires the insertion of the *same crime* in the Governor's warrant which is specified in the indictment or affidavit which supports the requisition or demand. Any rational system of criminal and penal justice would also demand the same procedure.

B.

The Supreme Court of Illinois held in its opinion that the petitioner was under a burden of proving by evidence that he was entitled to discharge upon the habeas corpus

proceedings. The legal sufficiency and validity of the Governor's warrant and the requisition and papers thereto annexed were attacked and challenged by petitioner who had a right to have the legal sufficiency of the warrant and requisition and other papers determined as a matter of law. Petitioner's contention that he was not substantially charged with crime by an indictment found or affidavit certified as authentic and made before a magistrate was a question of law and was always open upon the face of the papers to judicial inquiry. See *Roberts* v. *Reilly,* 116 U. S. 80, 92, 95. Petitioner was not under a duty or burden to prove by evidence that he was not a fugitive in fact. He was entitled to be discharged where it appeared as a matter of law, as it did in this case, that the warrant, and requisition and other papers annexed thereto were defective and insufficient, and did not comply with the Act of Congress. *Roberts* v. *Reilly, supra; Compton* v. *Alabama,* 214 U. S. 1, 6.

C.

The Governor's warrant (Rec. 12, 13) recited that there had been produced and laid before him an affidavit, certified as authentic, and duly authenticated and charging the petitioner with "the crime of wilful trespass, petty larceny and escaping from jail," which said Governor certifies to be a crime under the laws of the State of Mississippi. The affidavit (Rec. 21) referred to was not a charge of crime in any sense and contained none of the essentials of the charges of any of the offenses therein mentioned but was a mere recitation of events, and was not made before a magistrate and as a consequence said recital was of no avail. *Ex parte Hart,* 63 Fed. 249, 260. Next, the Governor of Mississippi did not certify that "wilful trespass, petty larceny and escaping from jail" was a crime under the laws of the State of Mississippi. This court must take

judicial notice that there was no such crime at common law and no such crime under the statutory law of the State of Mississippi.

Mere recitals in the demanding Governor's requisition are not sufficient of themselves to authorize the arrest and surrender of the alleged fugitive. *Ex parte Reggel,* 114 U. S. 642, 652; *Hartman* v. *Aveline,* 63 Ind. 344, 30 Am. St. Rep. 217. The requisition of the State of Mississippi was not evidence. Facts may be supplied only by duly authenticated affidavits certified as authentic by the demanding governor and containing legally competent evidence. Spear, Extradition, 3d Ed., p. 420. Misrecitals, overstatements and false and untrue statements in the requisition of the State of Mississippi cannot be received as evidence to deprive petitioner of his liberty and transport him to a distant state for trial. *Ex parte Smith,* 22 Fed. Cas. 373 at 379. The recitals contained in the Governor's warrant did not place upon petitioner any burden to overcome them by evidence in order to be discharged, and such recitals, false and untrue, did not make out a prima facie case against petitioner. *Roberts* v. *Reilly, supra.* The warrant under which petitioner was arrested was void and illegal and neither it nor its recitals made out a prima facie case which petitioner was under a burden to overcome. *Robert* v. *Reilly, supra; Compton* v. *Alabama,* 214 U. S. 1, 6.

III.

This Court has held that to be a fugitive from justice the demanded person must have been subjected to the criminal process of the demanding state. *Roberts* v. *Reilly,* 116 U. S. 80, 97. In the case of *In Re Strauss,* 197 U. S. 324, 331, which involved an extradition proceeding based on an affidavit, this Court held that the issuance of a warrant is a necessary element in formally and sub-

stantially charging an accused with crime. This Court in the above case used the following pertinent language:

> "In the strictest sense of the term a party is charged with crime when an affidavit is filed, alleging the commission of the offense and a warrant is issued for his arrest, and this is true whether a final trial may or may not be had upon such charge."

In the case at bar the requisition (Rec. 16) and papers annexed thereto fail to disclose that a warrant or capias for the arrest of the person demanded was issued (Rec. 16-21). Furthermore, there is no order of a court or magistrate finding that there was probable cause to believe the person demanded was guilty of a crime, and there was no order granting leave to file a criminal complaint against the Jack Bell therein named; there is nothing in the requisition (Rec. 16) and papers thereto annexed which would show that the issuance of a warrant or capias of arrest had been ordered by a judge or magistrate. A complaint or affidavit may be presented to a magistrate, or even filed, but because of its defects, omissions, insufficiencies, and its failure to state the facts constituting a criminal charge or crime, the application or motion for a finding of probable cause and the issuance of a warrant or capias of arrest may be denied. Mere presentation of an affidavit to, and mere filing of an affidavit before, a magistrate does not subject the person therein named to the criminal process of the demanding State. The requisition and papers annexed (Rec. 15-22) do not show that the person demanded has been subjected to a formal charge of crime by regular judicial proceedings wherein a warrant or capias of arrest has been issued and that there is pending an actual criminal prosecution in the State of Mississippi. The petitioner has not been charged with crime under and within the meaning of Article IV, Sec. 2, Par. 2 of the Federal Constitution and Sec. 5278 of the Revised Statutes. *In Re Strauss, supra; Roberts* v. *Reilly, supra; Ex parte White,*

49 Cal. 433; *Forbes* v. *Hicks*, 42 N. W. 898, 27 Neb. 111; *Ex parte Lorraine*, 16 Nev. 63; *Smith* v. *State*, 32 N. W. 594, 21 Neb. 552; 35 C. J. S., p. 332, Sec. 13, Note 48; *ibid, supra*, p. 323, Sec. 9, Notes 64, 69; 25 C. J. 261, Sec. 23, Note 26.

A person is not a fugitive from an affidavit but from criminal process, that is, from a warrant or capias of arrest. The petitioner is not a fugitive from the justice of the State of Mississippi within the meaning of the Federal Constitution and Act of Congress.

IV.

The affidavit charging escape (Rec. 19) relied upon by respondent and the Supreme Court of Illinois as constituting the foundation of the extradition proceeding *besides being uncertified by the Governor of Mississippi* was for other reasons not an affidavit substantially charging the petitioner with a crime as required by the Federal Constitution and Act of Congress. The instrument or supposed affidavit charging escape (Rec. 19) contained no handwritten signatures of the putative affiant and magistrate; it contains merely the typewritten name of W. Y. Brame and Ransom Clark. The paper contains no filing stamps, filing notations or signatures of a clerk or other officer. The instrument is not certified as a copy of an original on file in the judicial records of a court or office of a magistrate or judge by anyone under the seal of a clerk, or judge, or magistrate. The instrument contains no seal of any judicial officer. There is no statement or certificate of any officer having official custody of the records showing the right or authority of Ransom Clark to act as a Justice of the Peace. The Governor of Mississippi not having certified this alleged affidavit (Rec. 19) charging escape as authentic (having certified

as authentic the affidavit charging wilful trespass, petty larceny & escaping jail (Rec. 21)), there has been no certification of Ransom Clark as a Justice of the Peace or magistrate by the Governor of the State of Mississippi.

The typewritten name of W. Y. Brame (Rec. 19) appearing on this paper gives it an undoubted quality of fabrication, spuriousness, and lack of genuineness when it is considered that all of the other papers including two affidavits are signed by the handwritten signatures of W. Y. Brame (Rec. 18, 21).

Moreover, the signed statement by Ransom Clark (Rec. 20) far from lending authenticity to the spurious unsigned and typewritten paper (Rec. 19) in fact completely destroys it as an affidavit and robs it of all genuineness as an affidavit supposedly made before or in the presence of a magistrate. First, the statement by Ransom Clark (Rec. 20) does not refer to the paper or affidavit charging escape (Rec. 19); secondly, *the statement made by Ransom Clark shows that Ransom Clark himself issued the "affidavit" and that it was made by him Ransom Clark and not W. Y. Brame as supposed.* Ransom Clark says: "I hereby certify that the above and foregoing (an unknown something not mentioned or described in any manner) *is a true and correct copy of this affidavit as issued by this court.*" Ransom Clark thus certifies that *he made the affidavit and issued the affidavit* and thereby wholly negatives the notion or idea that W. Y. Brame made the affidavit before him Ransom Clark as a magistrate. The statement by Ransom Clark cannot by any reasonable judgment or interpretation be considered as a certification of the affidavit charging escape.

The requisition and the papers annexed and especially this supposed affidavit charging the offense of escape (Rec. 16-21) contain none of the regular and customary certification. This supposed affidavit (Rec. 19) not only was

not certified by the Governor of the State of Mississippi to the Governor of Illinois but it was not duly and regularly authenticated to the Governor of Mississippi as required by the Federal Constitution and Act of Congress. See Spear, Extradition, 3d Ed., p. 420; *State ex rel. Huston* v. *Clark,* 163 So. 471, 121 Fla. 161; *Kentucky* v. *Dennison,* 24 How. 66, 104. That there can be no constitutional and lawful statutory demand by the Governor of the demanding state *unless the charge of crime is duly and regularly authenticated to him* is well stated in Spear, Extradition, *supra,* as follows:

> "The indictment or affidavit which makes the charge of crime must be authenticated to the demanding executive, as regularly found in the one case, or made before a magistrate in the other; and when he certifies to the authenticity of the copy of the one or the other, he in legal effect certifies to the authenticity of the indictment or affidavit."

In this case there has been no authentication of the supposed affidavit charging escape (Rec. 19) to the Governor of the State of Mississippi, besides not having been certified as authentic by the Governor of Mississippi to the Governor of Illinois. The instrument relied upon by the respondent and the Supreme Court of Illinois is not an original affidavit signed in handwriting of anyone before a magistrate who has also signed in handwriting his signature to the jurat of the supposed affidavit. Where there has been none of the regular and usual certification and no authentication of the charge of crime to the demanding governor then only an original affidavit signed with handwritten signatures of the affiant and magistrate would furnish the safeguards against spurious and false charges which are contemplated by the Federal Constitution and the Act of Congress. Spear, Extradition, *supra; State ex rel. Huston* v. *Clark, supra.* A mere typewritten copy of an affidavit not regularly certified by a clerk or

udicial officer as a copy of an original on file, and not n any manner duly and regularly authenticated to the governor of the demanding state does not comply with Sec. 5278 of the Revised Statutes or Article IV, Sec. 2, par. 2 of the Federal Constitution. It was held in *State ex rel. Huston* v. *Clark, supra,* that an affidavit having a stamped name of a judge appearing underneath a written signature of an affiant is not an affidavit made before or in the presence of a magistrate within the meaning of Section 5278 of the Revised Statutes and the Federal Constitution. There is no showing that the alleged affidavit charging escape (Rec. 19) was made in the course of the administration of justice in a criminal prosecution. *People ex rel. La Rue* v. *Meyering,* 357 Ill. 166; Moore, Extradition, v. 2, p. 876, Sec. 553; *Ex parte Morgan,* 20 Fed. 298, 308; *Smith* v. *State,* 32 N. W. 594, 21 Neb. 552; *Ex parte White,* 49 Cal. 433. The attention of the Court is called to the fact that Section 5278 of the Revised Statutes refers to the certification of a "*copy of an indictment* found *or* an affidavit," etc. (Italics ours.) The statute does not plainly and unequivocally say that a *copy of an affidavit* may be certified. The alleged affidavit charging escape (Rec. 19) cannot be a lawful and constitutional charge of crime constituting the foundation of an extradition proceeding not only because it was not certified as authentic but also because of the reasons hereinabove set forth.

V.

"Wilful trespass, petty larceny & escaping jail" is not a charge of crime either at common law or under the statutory laws of the State of Mississippi within the meaning of the Federal Constitution and Act of Congress. This Court must take judicial notice that the statement above, contained in the requisition (Rec. 16) is not a charge

of crime either at common law or under the statutory laws of Mississippi. *Roberts* v. *Reilly,* 116 U. S. 80, 96. *The charge required by the Act of Congress and the Constitution must be of a specific crime and not of an indefinite wrong.* 35 C. J. S., p. 323, Sec. 9, Note 65; *Ex parte Slauson,* 73 Fed. 666, 667; *Smith* v. *State,* 32 N. W. 594, 21 Neb. 552. Merely to refer to a class of criminal acts is not a charge of a specific crime. *Ex parte Slauson, supra.* The affidavit of W. Y. Brame before the deputy circuit court clerk (Rec. 21) was a recitation of events only and a mere reference to (1) civil wrongs and torts, (2) a criminal offense, and (3) an equivocal act which might or might not be a criminal offense depending upon the particular circumstances; and such affidavit was not a charge of crime which complied with the Act of Congress and the Constitution. *Ex parte Riddle,* 101 S. W. (2d) 268-9-70, 131 Tex. Cr. 563; *Ex parte Thomas,* 108 S. W. 663, 53 Tex. Cr. 37; *Ex parte Slauson, supra; Smith* v. *State, supra; Ex parte Burford,* 3 Cranch 448, 450-452; 35 C. J. S., Extradition, *supra.*

Moreover, the affidavit mentioning "wilful trespass, petty larceny and escaping jail" (Rec. 21) was made before a deputy circuit court clerk and not before a magistrate and does not furnish the foundation for a lawful and constitutional rendition of petitioner. *Roberts* v. *Reilly, supra; Compton* v. *Alabama,* 214 U. S. 1, 6; *In Re Strauss,* 197 U. S. 324; *United States, ex rel. McCline* v. *Meyering,* 75 F. 2d 716; *Ex parte Hart,* 63 Fed. 249, 258, 259; *Ex parte Morgan,* 20 Fed. 298, 307; *State* v. *Chase,* 107 So. 541; *People, ex rel. Merklen* v. *Enright,* 217 App. Div. (N. Y.) 514, 217 N. Y. S. 288.

VI.

There is an obvious distinction between extradition proceedings based on indictments and those based on affida-

vits. *United States ex rel. McCline* v. *Meyering,* 75 F. (2d) 716, 718; *People ex rel. De Martini* v. *McLaughlin,* 243 N. Y. 417, 152 N. E. 854; *Ex parte Morgan,* 20 Fed. 298, 307; *Ex parte Hart,* 63 Fed. 249; *Ex parte Smith,* 22 Fed. Cas. 373, 3 McLean 121. Affidavits are not prima facie evidence of the statement of a criminal charge against the accused (*United States ex rel McCline* v. *Meyering, supra; People ex rel. De Martini* v. *McLaughlin, supra*), and must be subjected to greater and closer scrutiny. *People ex rel. De Martini* v. *McLaughtlin, supra; People ex rel. Lawrence* v. *Brady,* 56 N. Y. 182. Affidavits, unlike indictments, are not accepted as sufficient by the courts of the state in which the fugitive is seized. *People ex rel. De Martini* v. *McLaughlin, supra.*

The word "affidavit" used in Section 5278 of the Revised Statutes must be construed in the light of the 4th Amendment to the Federal Constitution. To this effect see *Raftery* v. *Bligh,* 55 F. (2d) 189 at 194:

> "It is well established that the affidavit called for by Section 5278 when so construed, is an affidavit stating facts of the affiant's own knowledge, which would be admissible as evidence and sufficient to warrant a finding of probable cause of the commission of the offense by the person charged therewith. *Ex parte Hart,* 63 Fed. 249, 28 L. R. A. 801."

To the same effect is the holding of *United States ex rel. McCline* v. *Meyering, supra,* in which case the court used this language:

> "Clearly the affidavit should contain facts from which the Governor of the asylum state may see that there is probable cause to believe that the accused committed the crime in question. The affidavit should state facts sufficient to satisfy the magistrate that probable cause exists. *Lippman* v. *People,* 175 Ill. 101, 51 N. E. 872."

The alleged affidavit charging only escape from jail (Rec. 19) relied upon by respondent (Rec. 24, 26), besides not

being certified as authentic, is also not a substantial charge of crime against the petitioner within the meaning of Article IV, Sec. 2, par. 2 of the Federal Constitution, or within the meaning of Section 5278 of the Revised Statutes construed together with, and in the light and background of the 4th and 14th Amendments to the Federal Constitution, or either of them. The instrument (Rec. 19) is not a charge of the crime of escape from jail. This paper (Rec. 19), purporting to be made by W. Y. Brame, was obviously made by a person who had no personal knowledge of the alleged escape from jail and no knowledge of any kind of the surrounding circumstances of the alleged escape. There is no statement by Brame that he saw Jack Bell escape. Brame does not state that he was a warden, jailer, or custodian of Jack Bell, or that Jack Bell was committed to his lawful custody. The supposed affiant does not state for what offenses, if any, Jack Bell was undergoing lawful imprisonment; nor when the alleged lawful imprisonment commenced; nor when it was to end; nor how much time remained for said Jack Bell to serve when he allegedly escaped. The statements made in the purported affidavit relied upon by respondent (Rec. 19) might well have been made even though the term of lawful imprisonment of Jack Bell might long since have expired at the time when it is alleged that he escaped. Moreover, there is no certified copy of any mittimus or judgment of conviction of Jack Bell attached to said instrument nor contained in the requisition papers; nor does said instrument (Rec. 19) have attached thereto any authenticated judicial records which would show the term of imprisonment and its lawful nature. The instrument (Rec. 19) contains merely a non-judicial unauthenticated statement of a supposed affiant who is not shown to have any personal knowledge of the commission of the crime of escaping jail.

The alleged affidavit (Rec. 19) does not show from whence or what place the demanded person escaped; or whether

he broke jail by breaking out of a building by force and violence; or whether he merely walked away from some plantation or farm or open space where there were no obstructions or confining walls; or whether Jack Bell merely walked away with the consent of his immediate jailer or custodian. The alleged affidavit (Rec. 19) does not contain a statement of the essential facts constituting the crime of escaping jail and contains no facts from which it might be determined whether the imprisonment or confinement of Jack Bell was lawful. There is an entire omission of facts which would constitute the criminal charge of escaping jail.

In commenting on the law of escape and the nature and elements of that offense, the Supreme Court of Nevada in the case of *State* v. *Clark*, 32 Nev. 145, at p. 153 had the following to say:

> "But, when the imprisonment is unlawful, and is itself a crime, the reason which makes the flight from prison an offense does not exist. In such a case the right to liberty is absolute and he who regains it is not guilty of the technical offense of escape."

The rule of law applicable to the offense of escape is stated in 10 R. C. L. 580, Sec. 13, as follows:

> "To constitute a break of prison and an escape therefrom, something must be done tending to open a way through confining walls, or other obstruction to free entrance or exit. There must be some actual application of force, not a constructive break, and an escape accomplished by a strategem, and not by force, is not a prison breech."

The rule of law in this situation was further elaborated on in 10 R. C. L. Section 10, at page 579, to this effect:

> "When the prisoner goes away from his place of lawful custody, the escape is the act of the prisoner; but when the prisoner is allowed to leave his place

of confinement, either negligently or voluntarily, by the officer having him in custody, the escape is the act of the officer."

The very foundation of the crime of escape is the lawful confinement of the prisoner. 10 R. C. L. Sec. 5, p. 581. Furthermore, a mere constructive breaking or walking out of an open prison door without using force of violence would not constitute the offense of escape. 2 Bishop, New Criminal Law, Sec. 1081; 10 R. C. L. 580; *State* v. *Clark*, 121 Kan. 817, 250 Pac. 300, 50 A. L. R. 986, at p. 988.

The affidavit charging escape only (Rec. 19) contains mere general conclusions; it does not contain a statement of all of the substantial elements constituting the crime of escape and as a consequence the petitioner was not substantially charged with crime within the meaning of the Federal Constitution and the Act of Congress. *Ex parte Hubbard,* 160 S. E. 569, 201 N. C. 472, 81 A. L. R. 547; *Ex parte Rovnianek,* 168 Pac. 327, 41 Nev. 141; *Ex parte Morgan,* 20 Fed. 298, 307-8; *U. S. ex rel. McClin* v. *Meyering,* 75 F. (2d) 716, 718; *Ex parte Burford,* Cranch 448, 451-2.

Moreover, the instrument charging only escape from jail (Rec. 19) was not certified as authentic by the Gov ernor of the demanding State of Mississippi and it did not furnish a lawful and constitutional basis for the rendition of petitioner. See *Roberts* v. *Reilly,* 116 U. S. 80, 95; *Compton* v. *Alabama,* 214 U. S. 1, 6; *U. S. ex rel. McClin* v. *Meyering, supra.*

CONCLUSION.

No person can or should be extradited from one state to another unless the case falls within the constitutional provision. *People* v. *Hyatt,* 172 N. Y. 176, 182, 64 N. E. 825, affirmed in 188 U. S. 691; *Ex parte Owen,* 10 Ok

Crim. 284, 136 P. 197. It is as much the duty of the court to discharge the prisoner where the papers are insufficient, as it is to order his return where the papers comply with the law. *State* v. *Chase,* 107 So. 541; *Ex parte Rovnianek,* 41 Nev. 141, 168 Pac. 327, 328; *Ex parte Hubbard,* 201 N. C. 472, 475-6, 160 S. E. 569. "The statute is one involving the substantial rights of citizens and its essential elements must be strictly followed." *United States ex rel. McCline* v. *Meyering,* 75 F. (2d) 716, 717. The petitioner has a right not to be imprisoned or dealt with by the States of Mississippi and Illinois in disregard of those safeguards provided by the Constitution and the Act of Congress against unreasonable seizures and ignorant and wanton removals. *Compton* v. *Alabama,* 214 U. S. 1, 6; *United States ex rel. McCline* v. *Meyering, supra; In Re Strauss,* 197 U. S. 324, 332; *People ex rel. De Martini* v. *McLaughlin,* 243 N. Y. 417, 152 N. E. 854. The petitioner should have been discharged. It is therefore respectfully submitted that the judgments and final orders of the Criminal Court of Cook County and the Supreme Court of Illinois should be reversed in order that justice may be done your petitioner and his liberty restored to him; and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of Illinois and, finally, reverse the same.

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(Appendix follows)